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IN THE

Supreme Court of the United States

October Term, 1953

No. 315

THE WESTERN UNION TELEGRAPH COMPANY and CHARLES H. FRAKE,

Appellants,

—vs.—

STATE OF NEW JERSEY,

Appellee.

OPPOSITION OF APPELLANTS TO MOTION TO DISMISS OR AFFIRM AND THEIR COMMENTS ON THE STATEMENT OF APPELLEE OPPOSING JURISDICTION

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In opposition to the *pro forma* Motion to Dismiss or Affirm, appellants contend that appellee in its statement opposing jurisdiction raises no substantial matters or grounds making against jurisdiction. Appellants in opposition to the motion beg leave to incorporate by reference the contents of their Statement as to Jurisdiction.

In the statement of appellee opposing jurisdiction the following cases:

Mergenthaler Linotype Company v. *Davis,* 251 U. S. 256, 259;

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 105;
Ex Parte Poresky, 290 U. S. 30, 32;
Zucht v. *King*, 260 U. S. 174, 176;
McArthur v. *United States*, 315 U. S. 787,

are cited as holding that an appeal taken of right will be dismissed or affirmed if no federal question, or no substantial federal question, is raised. With this appellants have no quarrel. The criteria outlined in particular in the *Levering* case are that the federal question raised (1) "may be plainly unsubstantial either because obviously without merit" or (2) "because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy".

No demonstration is made in the statement of appellee opposing jurisdiction that either criterion is applicable. Certainly, appellants have shown in their Statement as to Jurisdiction that the questions are substantial; and appellee does not purport to cite any prior decision of this court even touching upon the questions raised, let alone concluding them. Certainly the decisions of this court cited by appellee (other than those on procedural points mentioned above) are not even close to the questions here raised; *Geer* v. *Connecticut*, 161 U. S. 519 upholds a statute forbidding the killing of "any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of this State"; *Kidd* v. *Pearson*, 128 U. S. 1 upholds the Kansas Prohibition Statute in-

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cluding the provision forbidding manufacture or sale for export from the state; *Coe* v. *Errol,* 116 U. S. 517 allows New Hampshire to levy a non-discriminatory tax upon logs cut in that state while *in situ* though intended for export to Maine; and *Hudson Water Co.* v. *McCarter,* 209 U. S. 349 upholds a New Jersey statute prohibiting the transportation of water of that state into any other state. In the *McCarter* case in this court the decision of Judge Holmes is far less extensive than the decision of the New Jersey courts (for which appellee cites the decision), and we submit that the holding in the case in this court has no aplication whatsoever to the instant case. While more appropriate for discussion when the appeal is heard on the merits, a few words of preliminary comment on the New Jersey case of *Ames* v. *Kirby,* 71 N. J. Law 442 are in order: In the first place it involves a different statute from that on which this indictment No. 5012 under review was founded, namely, that now contained in R.S. 2:135-3 on which was based another indictment not moved for trial but still pending, Indictment No. 5013; furthermore, it was the decision of a court of original, not appellate, jurisdiction and was not on the merits but on decision of a petition for habeas corpus.

Perhaps appellee cites the *Mergenthaler* case (decided January 5, 1920) for the statement in its concluding sentence that the question sought to be raised on writ of error "might afford basis for certiorari but constitutes no ground for writ of error from this court." If so, appellee overlooks the fact that that decision antedates the 1925 rewriting by the Congress of Section 237 of the Judicial Code (43 Stat. 937) which *inter alia* added sub-

division (c) thereof (28 U. S. C., 1940 ed., s. 344). This is the provision now contained in 28 U. S. C. s. 2103, which requires this court, where a party has mischosen appeal rather than certiorari, to treat the papers on appeal as a petition for writ of certiorari.

Appellants believe they have correctly chosen appeal. However, if for any reason it should be the view of the court that appellants have mischosen the appellate avenue, appellants beg leave to have the court consider their 3rd and 4th assignments of errors and prayer for reversal (copy attached hereto as Appendix A) together with their appeal papers as a petition for certiorari.

New York, New York,
September 4th, 1953.

Respectfully submitted,

JOHN H. WATERS
WILLIAM G. H. ACHESON
Counsel for Appellants.

APPENDIX A

Assignment of Errors and Prayer for Reversal

[Same Caption]

The Western Union Telegraph Company and Charles H. Frake, appellants herein, and each of them, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which each will rely in the prosecution of said appeal from the final judgment of the Supreme Court of New Jersey entered on June 1, 1953.

The Supreme Court of New Jersey erred:

1. In holding valid R.S. 2:103-1 and the indictment of defendants thereon and the judgments of conviction thereon, against the claim of its being repugnant to the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

2. In holding valid R.S. 2:103-1 and the indictment of defendants thereon and the judgments of conviction thereon, against the claim of its being repugnant to the Commerce clause, Article 1, Section 8, Clause 3, of the Constitution of the United States as a burden on interstate commerce.

3. In applying the concept of the common law disorderly house under New Jersey law against the Telegraph Company and against its manager at the Bridgeton, New Jersey, office, upon the ground of repugnance to the Due Process clause of the Fourteenth Amendment to the Con-

stitution of the United States because such concept is so vague as to be void for the reason that the concept embraces the gamut of acts declared unlawful, both statutory and at common law, whether criminally or civilly.

4. In applying the concept of the common law disorderly house under New Jersey law against the Telegraph Company and against its manager at the Bridgeton, New Jersey, office, upon the ground of repugnance to the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States as a burden on interstate commerce because such concept is so vague as to be void for the reason that the concept embraces the gamut of acts declared unlawful, both statutory and at common law, whether criminally or civilly.

WHEREFORE, appellants, The Western Union Telegraph Company and Charles H. Frake, pray that the final order and judgment of the Supreme Court of New Jersey be reversed, and for such other relief as the Court may deem fit and proper.

Dated: New York, N. Y.
July 24th, 1953.

Respectfully submitted,

/s/ JOHN H. WATERS
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